IPMUDA UTARA SDN BHD

v.

WESTECH SDN BHD

HIGH COURT MALAYA, IPOH
JAMES FOONG J
[CIVIL SUIT NO: 22-7-98]
4 FEBRUARY 2002

CIVIL PROCEDURE: *Appeal - Notice of appeal - Time stipulated for service - Whether compliance mandatory - Rules of the High Court 1980, O. 56 r. 1(3) - Whether non-compliance a bar to appeal*

On 7 November 2001, the deputy registrar had allowed the defendant's application to strike out the plaintiff's writ and statement of claim. The plaintiff appealed and the appeal was fixed on 1 February 2002. The plaintiff faxed a copy of the notice of appeal to the defendant on 29 January 2002 and posted another on 30 January 2002.

The defendant raised a preliminary objection contending that as the notice of appeal had been served out of time, the plaintiff should be barred from proceeding with the appeal.

Held:

[1] A notice of appeal sent by post, not fax, constitutes proper service as it is a sealed copy. However, the facts indicate that the notice had been served out of time. (p 286 e-g)

[2] The use of the word "must" in O. 56 r. 1 (3) of the Rules of the High Court 1980 connotes a mandatory requirement upon the plaintiff to serve the appeal notice within the prescribed time limit. Their failure to comply prevented them from proceeding with the appeal. (p 287 a)

[Defendant's preliminary objection allowed; plaintiff's appeal dismissed with costs.]

Case(s) referred to:

Chern Yen Ming & Anor v. Teng Ik Ngee Construction Sdn Bhd & Ors [1996] 1 CLJ 571 ***(foll)***

Ooi Chew Seng v. Utratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(foll)***

Public Feedmill (M) Sdn Bhd (In liquidation) v. Hai Yeu Hin [1994] 2 CLJ 802 ***(foll)***

Sykt Pembenaan Raya Sdn Bhd v. Langkawi Marble Co Sdn Bhd & Co [1997] 4 CLJ 752 ***(not foll)***

Legislation referred to:
Rules of the High Court 1980, O. 56 r. 1(3)

For the plaintiff - Suhairi Sukor; M/s Chong & Poh
For the defendant - Alex Charles; M/s Ashikin Alex & Rakan-rakan

Reported by Suhainah Wahiduddin

JUDGMENT

James Foong J:
Enclosure 38 is an appeal by the plaintiff against the decision of the timbalan pendaftar (TP) in allowing the defendant's application to strike out the plaintiff's writ and statement of claim.

The TP's decision was delivered on 7 November 2001. An office copy of the notice of appeal was sent to the defendant on 30 January 2002. But prior to this, on 29 January 2002, a copy of this notice was faxed to the defendant.

At the hearing of this appeal counsel for the defendant raised a preliminary objection: that O. 56 r. 1(3) of the Rules of the High Court 1980 ('RHC') was not complied with by the plaintiff.

Going by the date stated in the notice of appeal, which is 16 November 2001, the notice of appeal was issued within the ten days limitation after the decision of the TP.

But was this notice served on the defendant not later than five days before the date fixed for hearing of the appeal?

The appeal was fixed on 1 February 2002. If taken from the date of posting of this notice this would be four days late. If the date of faxing a copy is considered then it is three days late.

Going by the line of authorities: *Chern Yen Ming & Anor v. Teng Ik Ngee Construction Sdn Bhd & Ors* [1996] 1 CLJ 571 & *Ooi Chew Seng v. Utratech Sdn Bhd & Ors* [1997] 5 CLJ 421, then only the notice send by post is considered service. This is for reason that it was a sealed copy. The one by fax is not.

When the notice of appeal was served out of time, is it fatal? three cases say it is. They are the two cases cited above and *Public Feedmill (M) Sdn Bhd (In liquidation) v. Hai Yeu Hin* [1994] 2 CLJ 802. However there is one case of concurrent jurisdiction as the others which says otherwise: *Sykt Pembenaan Raya Sdn Bhd v. Langkawi Marble Co Sdn Bhd & Co* [1997] 4 CLJ 752. The rational of this latter case dispute the words "appeal was not brought" if service of the notice is out of time.

After careful perusal of these cases, I am inclined to follow the majority. I am of the view that the use of the words "must" in O. 56 r. 1(3) RHC connotes a mandatory requirement upon the plaintiff/appellant to comply with the time stipulated in this order. Thus, failure to comply would bar the plaintiff/appellant from proceeding with the appeal.

For this reason, I allow the preliminary objection of the defendant and dismiss encl. 38 with cost.